IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.114 of 2006
with
Civil Application No.227 of 2006

Gopalrao H.Shitole and anr. ..Appellant

vs.

Baban Jaisingh Pawar ..Respondent

Shri G.S.Godbole for appellants
Shri Milind Deshmukh for respondent.

CORAM: S.C.DHARMADHIKARI J.
29th August, 2007

P.C.

1. After hearing Shri Godbole for the appellant, notice was issued in this appeal. It appears from the order of the learned single Judge that on the limited issue regarding the manner in which Exhibits 45, 47 and 49 have been disposed of by the lower Appellate Court and thereafter the impugned judgment was rendered, that the learned Judge felt that substantial question of law would arise for determination of this Court.

2. After the notice was issued, Shri Deshmukh has appeared for the original plaintiff. With the consent of Shri Godbole and Shri Deshmukh I proceed to frame the following substantial questions of law and upon hearing

both the learned Counsel decide the appeal finally. Hence, Admit. By consent, appeal placed for hearing and final disposal. Respondent waives service.

i) Whether the lower Appellate Court was right in rejecting the applications Exhibits 45, 47 and 49 on the ground which are more particularly set out in paras 7, 8 and 9 of the order dated 17th June 2004?

ii) Whether the lower Appellate Court was right in holding that no amendment of the written statement is permitted when the matter is at the stage of appeal?

iii) Whether the lower Appellate Court was right in applying the principle of due diligence of the parties with regard to exhibiting of documents or knowledge of its contents to the application for amendment of the written statement made during the pendency of the appeal under sec.96 of the Code of Civil Procedure?

iv) Whether the lower Appellate Court was right in holding that Order 41 Rule 27 of the Code of Civil

Procedure would not apply because the documentary evidence which is sought to be relied upon is in the form of public documents?

v) Whether the Lower Appellate Court could have rejected application Exh.49 without assigning any reasons?

3. Shri Godbole tendered additional compilation which is forming part of the record of the second appeal. It is referred to for the limited purpose of perusing the applications upon which the order has been made on 17th June, 2004.

4. At the out set I am making it clear that merits of the appeal and rival contentions pertaining thereto are not being decided and they are kept open for being urged before the lower Appellate Court.

5. The lower Appellate Court has dismissed the appellant’s appeal by the impugned order.

6. Reg.Civil Appeal No.41 of 1996 was directed against the judgment and decree of the Civil Judge, Jr.Dn., Daund dated 30th November, 1995 in Reg.Civil Suit No.112 of

1987. The suit was filed by the respondent/original plaintiff for removal of encroachment and possession.

7. It is not necessary to refer to the facts in great details. All that was put in issue was whether the respondent/plaintiff's suit for possession of encroached portion bearing 38 R out of Gat no.75 of village Kurkumbh, Taluka Daund more particularly described in para 1 of the plaint could be decreed without any specifications of the encroachment. The suit was decreed on the basis that the respondent is the owner and in possession of the suit property. The appellants are having their field Gat No.74 on the eastern boundary of the property. It is the case of the respondent that since 1981, the appellants encroached upon the eastern portion/side of the property. They, therefore, made an application to the District Inspector of Land Records for measurements and survey. The survey was made on the application by the respondent in presence of the appellants. This survey indicated encroachment to the extent indicated above. Since the appellants refused to hand over possession of the encroached portion that the suit was instituted.

8. It is contended by the appellants that they are the owners of Gat No.74 and are in possession thereof. There

is a bund which has been constructed on the eastern side and that has been in existence for considerable length of time. There is no encroachment. The appellants relied upon the measurements carried out in the year 1986. They disputed the survey of the land bearing Gat No.75 carried out by the District Inspector of Land Records. This is the stand in the written statement filed by appellant no.1.

9. The lower Appellate Court agreed with the Trial Court that the encroachment has been carried out and, therefore, the suit was rightly decreed.

10. During the pendency of appeal, the appellants filed subject applications. Firstly, for amendment of the written statement; secondly for leading additional evidence and thirdly for production of documents from the office of TILR.

11. On these applications, reply was filed by the respondent and the order passed on the same reads thus:

> "7. As far as the application at Exh.45 is concerned, it is governed under the provisions of Order 6 Rule 17 of C.P.C. O.6 R.17 provides that

amendment can be made at any stage of the proceedings, if the Court finds it necessary for the purpose of determining the real question in controversy between the parties. There is proviso for a Rule 17, which provides that no application for amendment shall be allowed after trial has commenced, unless the Court comes to the conclusion that inspite of due diligence the parties could not have raised the matter before the commencement of the trial. Thus, in simple words proviso of order 6 Rule 17 shows that amendment cannot be allowed after the trial has commenced. This is the universal rule and the exception is that the party claiming amendment inspite of due diligence, could not have raised the matter before commencement of the trial. In the instant case the nature of the amendment is based on old revenue record which was also possible for the appellant/defendant to go through it and can be put its case consistent to the alleged old record. However, the application at Exh.45 does not show any reason as to why the amendment could not be made earlier. Therefore, as provided under mandate of the proviso of O.6 R.17 in the present set of circumstances, amendment cannot be allowed, after commencement of the trial.

Therefore, the application for amendment of the w/w has to be rejected.

8. In another application Exh.47 the appellant/defendant wants to produce additional documentary evidence and O.41 R.27 provides an universal rule that no evidence in appeal. However, it carves three exceptions and the case of the present appellant does not fall in any of the three exceptions. These documents are of revenue record, which was quite possible for any person to go through and to find it out and to obtain its certified copy. In a case of public record, law presumes that every person is having knowledge about the same. In such circumstances, it has to be held that the appellant/defendants were having knowledge about these documents sought to be produced during trial, but for their reluctance, they were not produced in the Trial Court. Therefore, I hold that the application for production of additional documentary evidence as it does not come in any of the 3 exceptions of O.41 Rule 27 has to be rejected.

9. The application at Exh.49 is for issuance of

notice to TILR in other words that is also for production of additional evidence, that too with the assistance of the court, which is not permitted under the law. Hence, the application at Exh.49 is also liable to be dismissed."

12. It is not disputed that a writ petition under Article 227 of the Constitution of India was filed by the appellants challenging this order and this Court disposed of writ petition no.1827 of 2005 by permitting the parties to challenge the final order that may be passed in the suit and appeal and raise necessary grounds/submissions.

13. It is pursuant to this liberty that the appellants pressed their application.

14. In the application filed below Exh.47, the appellants contended that since 1918, the holding of respondent/plaintiff was less than 30 gunthas and in 1936 it exceeded the same. This application was filed to seek assistance from the documents which are as old as of 1918 and 1936 to find out the extent of the encroachment, if any. Admittedly, the plaint averments proceeded on the basis that the appellants have committed encroachment and

that is sought to be established by relying upon the survey carried out as early as in 1981. The suit has been filed in the year 1987. The decree of the Trial Court was of the year 1995. In such circumstances, a request was made that these documents would be very vital and they can be produced at this stage. The application was, therefore, made for leading additional evidence. Apart from such an application, additional request was made for amending the written statement to clarify and amplify the extent of holding of the parties.

15. These applications ought to have been dealt with by applying the settled principles. It is not clear as to why the learned Judge feels that the amendment cannot be granted. Whether the proviso to O.6 Rule 17 of C.P.C., which has been introduced by amendment Act of 2002, would apply to the instant suit or not is also not clear from the order passed by the learned Judge. Further, what is the prohibition in law which does not permit grant of amendment to the written statement at the stage of appeal is also not spelt out. This is an application for amendment to the written statement. Why such an application should not be allowed or whether it has to be disallowed merely because it is delayed is also not clear. In my view, the learned Judge has brushed aside and

ignored the settled provisions so also not applied his mind to the facts of the case. Whether the amended Code of Civil Procedure would apply to such an application or not must be clarified by him. Similar is the fate with regard to the application made under Order 41 Rule 27. Why the learned Judge feels that the application preferred by the appellants does not fall in any of the three exceptions under Order 41 Rule 27 is not clear to me from the order dated 17th June, 2004.

16. Application Exh.49 has also not been dealt with in the manner provided by law.

17. The approach of the learned Judge, therefore, vitiates the impugned judgment and this is a reason why I am of the view that interest of justice would be subserved if the impugned judgment and decree of the lower Appellate Court is quashed and set aside. The Reg.Civil Appeal from which the said judgment arises, namely, Reg.Civil Appeal No.41 of 1996 stands restored to file of the District Court, Baramati for being decided afresh without being influenced by any observations in the earlier judgment and order. The lower Appellate Court while deciding the said appeal should also pass orders afresh on Exhibits 45, 47 and 49 which have been filed by the appellants for the

reliefs enumerated above. These applications also should be dealt with uninfluenced by the earlier order and on their own merits. Needless to state that the learned Judge to whom the appeal is assigned shall take up the applications and appeal together. Needless to further state that if he is of the opinion that the application deserves to be allowed he should pass appropriate orders and thereafter follow the course of action permissible in law. For this purpose he would have enough power to postpone the hearing of the appeal. All this has to be done by the learned Judge uninfluenced by any observations in the judgment and order of this Court. It is specifically clarified that I have not gone into the rival contentions either on merits or on the contents of the applications preferred by the appellants and the same are kept open for being raised before the lower Appellate Court. The lower Appellate Court should endeavour and dispose of the proceedings within a period of six months from the date of appearance of the parties before the lower Appellate Court. Both parties shall appear before the lower Appellate Court on 10th September, 2007. Since the appeal is being restored to file for being decided afresh and on merits together with the subject applications, it need not be clarified that the order dated 17th June, 2004 passed during the course of the

hearing of the appeal is also quashed and set aside. The second appeal is disposed of accordingly.

18. In view of disposal of the second appeal as above, civil application does not survive and is accordingly disposed of.

(S.C.DHARMADHIKARI J.)